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Via E-mail

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**Re: EIR Comments - August 2, 2011 Fifth Staff Draft Delta Plan (Administrative Draft) and Delta Plan Program Environmental Impact Report**

On behalf of the Pacific Coast Federation of Fishermen's Association, the Institute For Fisheries Resources, and the California Sportfishing Protection Alliance (collectively "PCCFA") please consider these comments on the Fifth Draft Delta Plan ("Draft Plan") and the accompanying Delta Plan Program Environmental Impact Report ("DEIR"). These comments also incorporate by reference the comments submitted by the law firm of Rossmann & Moore, LLP and the Environmental Water Caucus. PCCFA is very concerned that the Draft Plan falls short of the Legislature's goal to affect a "fundamental reorganization of the state's management of Delta watershed resources." (Water Code § 85001(a)) Instead, the Draft Plan resists change, incorporating without any independent judgment future decisions and actions already underway by the State Water Resources Control Board ("State Board"), Department of Water Resources ("DWR"), the Department of Fish & Game ("DF&G") and other agencies and water suppliers. Many of these decisions will not be completed for years. As a result, the Draft Plan's policies are riddled with holes, avoiding addressing substantive components necessary to creating a comprehensive plan. Because the Draft Plan largely defers to other agencies' future decisions, the accompanying DEIR is largely useless as a programmatic-level environmental review. In effect, there is no plan that will result in any change – never mind a fundamental change – in direction by other state agencies, water users and water suppliers. Nor will the DEIR serve as a programmatic EIR that could in the future help to expedite environmental review of important Delta restoration projects.

The Sacramento-San Joaquin Delta Reform Act of 2009 ("the Act") established the Delta Stewardship Council ("the Council") "as an *independent agency* of the state." (Water Code § 85200(a), emphasis added) Pursuant to Water Code § 85210, the Council is endowed with various powers in its general mission of developing a management plan for the Delta. The legislature declared that "[b]y enacting this division, it is the intent of the Legislature to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from

the Delta, and to establish a governance structure that ***will direct efforts across state agencies*** to develop a ***legally enforceable Delta Plan***.” (Water Code § 85001(c), emphasis added) The Draft Plan is to be a “***comprehensive***, long-term management plan for the delta. . . .” (Water Code § 85059, emphasis added) Inherent to the overarching “co-equal goals” established by the Act is, in addition to the on-the-ground protections and restoration of the Delta sought by the Legislature, the objective to “[e]stablish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives.” (Water Code § 85020(h)) The co-equal goals are defined in the Act as “the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (Water Code § 85054)

Any plan that purports to meet the statutory requirements of the Delta Reform Act must present a water availability analysis that shows, among other things, to what extent the scarce resource of water will be available to meet the Reform Act’s goals. Such an analysis would have to include an evaluation of the historical overallocation of water, an assessment of real vs. “paper” water, area of origin statutory restrictions, and an application of the public trust doctrine. Any plan would also have to demonstrate advancement of the co-equal goals in a way that reverses the historical sacrifice of the Delta ecosystem for the sake of water exports. The Draft Plan and its DEIR do none of these things. Moreover, the Draft Plan would need to include a socio/economic analysis for any public trust balancing or, for that matter, simply providing the necessary information to make wise decisions about allocating a scarce resource. The Draft Plan and its DEIR likewise fail in this regard. In these and other respects, as detailed below, the Draft Plan suffers from vagueness and a lack of a comprehensive, enforceable plan in violation of the Delta Reform Act of 2009. The Draft Plan’s DEIR likewise suffers from multiple deficiencies in violation of the California Environmental Quality Act (CEQA) as detailed below.

**A. The Draft Plan’s Overreliance on Future Decisions by Other Agencies, Without an Independent Plan of its Own, Fails to Consider and Incorporate Actions, Strategies, and Subgoals to Achieve the Act’s Objectives.**

“The Delta Plan shall include subgoals and strategies to assist in ***guiding*** state and local agency actions related to the Delta.” (Water Code § 85300(a) (emphasis added)) The Act requires that “[t]he council shall consider, for incorporation into the Delta Plan, actions designed to implement the subgoals and strategies described in subdivision (e).” (Water Code § 85300(f)) The subgoals and strategies designated by the Act are substantive, including restoring large areas of habitat, establishing migratory corridors for fish and other wildlife, promoting self-sustaining populations of native and valued species, “restor[ing] Delta flows and channels to a healthy estuary and other ecosystems,” and improving water quality. (Water Code § 85300(f))

By, in many instances, deferring inclusion of any enforceable actions or concrete strategies in the Draft Plan until other agencies finish pending proceedings, the Council has failed to comply with its duty to consider actions designed to implement the Act’s subgoals and strategies. By failing to incorporate in the Draft Plan any actions beyond the bare statutory subgoals and strategies, the Council fails to provide any meaningful guide to the other agencies

about their various actions. The Council has been tasked by the legislature with creating a plan, not merely an inventory of other agencies ongoing activities and their possible future decisions. As the Delta Vision Strategic Plan – the primary blueprint for the Act – observed, “[a]ttaining the co-equal goals is impossible without a new system of governance in the Delta. The new governance system must be capable of ***making difficult decisions and implementing effective policies***. . . .” (Delta Vision Strategic Plan, p. 121, emphasis added)) The Council should edit the Draft Plan to make the difficult choices between competing interests by adopting concrete strategies and actions that balance the co-equal goals while addressing the paramount concern of permanently protecting the Delta’s natural and scenic resources. (Water Code § 85022(c)) Based on the best scientific information currently available, the Draft Plan should specifically choose certain future strategies and actions rather than leaving those choices entirely to future determinations by other agencies. The Council should provide this plan knowing that it may not ultimately be the last word, and that other agencies will have to fulfill their legislative and public trust mandates and in so doing may choose other, inconsistent strategies and actions. If other agencies adopt actions inconsistent with this Plan, then the Council can choose to find those actions inconsistent or may amend its Plan to conform to the new information embodied in those actions. Indeed, the Act mandates that the Council review the Draft Plan every 5 years and revise it accordingly. (Water Code Section 8500(c)) Either way, the Council is required to adopt an ***enforceable*** plan that fundamentally changes the governance structure for Delta-related decisions and, ultimately establishes with the Council the powerful check and balance role envisioned by the Legislature to assure achievement of the co-equal goals and the objectives established by the Act.

**1. By deferring to other agencies’ future decisions, the Draft Plan preserves the status quo rather than fundamentally changing the governance structure of Delta-related decisions.**

As the Delta Vision Strategic Plan recognized, “continuation of the current system of governance—a ‘system’ in name only—guarantees continued deadlock and inevitable litigation.” (Delta Vision Strategic Plan, p. 121) That concern has been embodied in the Reform Act. A principle finding of the Act is that “[r]esolving the crisis [in the Delta] requires fundamental reorganization of the state’s management of Delta watershed resources.” (Water Code § 85001(a)) By enacting the Reform Act, the legislature expressly intended – on the same par as achieving on-the-ground benefits to water quality, habitat and water supplies – “to establish a governance structure that will **direct efforts across state agencies** to develop a legally enforceable Delta Plan.” (Water Code § 85001(c), emphasis added)

The Draft Plan is at odds with that legislative intent. By completely deferring to future decisions of other agencies and avoiding adopting strategies and actions in the Draft Plan that address up front the substance of those decisions, the Council proposes for other agencies to direct the Council rather than vice versa. Moreover, the fundamental change in governance is thwarted because the mish mash of uncoordinated agency decisions will determine the Draft Plan rather than the Council, as required by the Act. “[C]ontinuation of the current system of governance – a ‘system’ in name only – guarantees continued deadlock and inevitable litigation.” (Delta Vision Strategic Plan, p. 121)

The deferral of plan components to other agencies in the future is replete throughout the Draft Plan. The Draft Plan does not rely upon the State Board's flow criteria provided for under the Act but instead makes believe those criteria are only interim and simply defers to the State Board to come up with the "final" flow decisions rather than the Council making the tough planning decision itself which would guide the State Board's process. (Draft Plan, p. 86. *See infra*, pp. 7-8) The deferral of the Draft Plan's handling of the question of the necessity or wisdom of a peripheral canal or dual-conveyance system for the Delta by deferring entirely to the BDCP process provides no guidance to those agencies and water users. (Draft Plan, p. 87. *See also infra*, pp. 4-5) The same is true for the water storage, improvements to existing conveyances and critical water quality requirements. (Draft Plan, pp. 90, 148-49) By reversing the Act's directive to have the new governance structure that **directs efforts across state agencies**," rather than have the preexisting agencies direct the Council, the Draft Plan conflicts with the Act. (Water Code § 85001(c), emphasis added)

**2. By deferring to other agencies' future decisions and leaving entire substantive elements of the Draft Plan to other agencies' future decisions, the Draft Plan is inconsistent with the Legislature's intent that the Draft Plan be comprehensive and enforceable.**

The Act requires a comprehensive, enforceable plan. (Water Code §§ 85001(c); 85059) The only enforceable components of the Draft Plan are the "policies." A number of critical elements of the Draft Plan have no policies associated with them, as shown below (without limitation). Hence, those components are unenforceable. The Draft Plan must include enforceable strategies and subgoals as required by the Reform Act.

**a. The Draft Plan fails to address key strategies and actions claimed by the Bay Delta Conservation Plan (BDCP).**

The BDCP would, if completed, most likely result in extensive construction projects consisting of, among other things, new water conveyance facilities. The Draft Plan admits candidly that the BDCP and any resulting structures "would have large impacts on the Delta and would affect the co-equal goals." (Draft Plan, p. 62) But in order for the BDCP to be incorporated into the Delta Plan, it must meet certain goals as set forth in the Act. (Water Code § 85320) Rather than provide a plan for how the BDCP might comply with those statutory requirements for inclusion, the Draft Plan merely states essentially that the BDCP will either comply or not. (Draft Plan, pp. 87) Rather than providing any enforceable policy or strategy guiding the adoption of a BDCP that advances the coequal goals, the Draft Plan provides merely a recommendation (ER R8) that the BDCP process be completed by December 31, 2014. (*Id.*; Draft Plan, Appendix A, pp. 4-5) Recommendation ER R8 goes on to say that if the process is not completed by that date, the Council "will consider how to proceed with an alternative process to develop and complete the ecosystem and conveyance planning process." (Draft Plan, pp. 87 and 125)

The policy should provide benchmarks by which the agencies approving and/or adopting the BDCP can proceed toward the satisfaction of the statutory criteria for inclusion within the Delta Plan. Ideally, the Council should make a determination for purposes of the mandated Plan what the components of a BDCP should include consistent with the co-equal goals and the Act. If there are several possible versions of the BDCP, the Draft Plan could have several contingent options for this critical component. Such an approach is necessary in order for the Draft Plan to be *comprehensive* and to make sure that the Council's Plan is enforceable now upon issuance. Likewise, making tough decisions up front in the Draft Plan about what should or should not be included in the BDCP is consistent with the requirements of Water Code § 85303 that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." The Draft Plan's neutral approach to the BDCP violates this responsibility to promote such options.

**b. The Chapter 4 subsections "Expand Water Storage and Improve Existing Conveyance" and "Sustainable Groundwater Management" each contain no binding strategies or actions that are enforceable.**

Chapter 4 concerns water supply reliability. At least two components necessary to address issues of water supply reliability have no enforceable strategies or actions included in the Draft Plan - "Expand Water Storage and Improve Existing Conveyance" and "Sustainable Groundwater Management." (Draft Plan, pp. 87 - 94)

The subsection "Expand Water Storage and Improve Existing Conveyance" states, albeit without evidentiary support, "[t]he current configuration of water storage and Delta conveyance facilities is not adequate or sufficiently flexible to meet the coequal goals. New facilities for conveyance and storage – and an improved linkage between the two – are needed to better manage California's water resources..." (Draft Plan, p. 87) Whether valid or not, however, the Draft Plan then states, "...[n]o policies with regulatory effect are included in this section." This violates the Act's requirement to provide an enforceable plan that advances the co-equal goals.

The same problem infects the next subsection, "Sustainable Groundwater Management." After describing the problems with the fact that groundwater use in California is "largely unregulated" (Draft Plan, p. 90), the Draft Plan proceeds to state, "...[n]o policies with regulatory effect are included in this section." This is despite the Draft Plan's admission that "...[t]he continued existence of groundwater basins in a chronic condition of critical overdraft along with poor groundwater management practices, including unsustainable pumping and lack of groundwater management plans, impedes water supply reliability and threatens to cause serious economic and environmental harm to the California." This gap precludes the Draft Plan from being comprehensive and provides no enforceable plan that addresses the serious groundwater problems linked to the uncoordinated management of the Delta.

**c. The Chapter 6 subsections “Drinking Water Quality” and “Environmental Water Quality” each contain no binding policies that are enforceable.**

Chapter 6 concerns water quality. As with the previous sections lacking enforceable provisions, this chapter’s subsections omit any binding or enforceable strategies or actions. After discussing the problems with water quality impacting drinking water supplies in the Delta, the Draft Plan states at p. 141, “[n]o policies with regulatory effect are included in this section.” Likewise, after discussing problems with environmental water quality, the Draft Plan omits any enforceable strategies in the same manner at p. 148.

**d. The Chapter 8 subsection “Natural, Agricultural, Recreational, and Cultural Heritage” contains no binding strategies or subgoals that are enforceable.**

Chapter 8 concerns cultural, recreational, natural resources, and agricultural values. As with the previous discussion, this chapter lacks binding, enforceable actions that would form part of an enforceable plan. For natural, agricultural, recreational, and cultural heritage, the Draft Plan states: “[a]t this time, no policies with regulatory effect are included in this section.” (p. 197.) This omission fails to provide enforceable strategies or actions that would form part of an enforceable plan. It also fails to provide for measures to “protect and enhance the unique cultural, recreational and agricultural values of the California Delta as an evolving place” in violation of Section 85020(b) of the Reform Act.

**3. The Draft Plan’s reliance on “recommendations” for most state agency actions is inconsistent with the Reform Act.**

There appears to be a general rule being applied by the Council that whenever an action involves a sister state agency, it should not be included as an enforceable policy in the Draft Plan but a mere recommendation. Recommendations in the Draft Plan are not enforceable. Nor are recommendations contemplated by the Reform Act for substantive components of the Draft Plan. The only recommendations authorized by the Act involve the Council’s interim plan, where portions of the Draft Plan involve land management within the Delta or areas outside of the Delta, or suggesting priorities for state investment in levee management. (Water Code § 85084 (interim plan includes recommendations for early actions, projects, and programs); § 85302(b) (“the Delta Plan may include recommended ecosystem projects outside the Delta”); § 85302(h) (Plan shall include recommendations regarding state agency management of lands in the Delta); § 85306) No recommendations are associated with the strategies and subgoals mandated by the Act. (Water Code § 85302(e)) Indeed, in terms of the core components of the Draft Plan, the Act only contemplates other agencies making recommendations to the Council – not the other way around: “[t]he council may request any state agency with responsibilities in the Delta to make recommendations with respect to revision of the Delta Plan.” (Water Code § 85300(c))

Where the Act provides for the Draft Plan only to make “recommendations” for specific non-core issues, the Council cannot imply authority under the Act to rely on unenforceable recommendations for the vast majority of its Plan. Such a reading is inconsistent with the mandate that the Draft Plan be comprehensive and enforceable. In order to be comprehensive and enforceable, the Draft Plan should be rewritten to make all of the recommendations binding and enforceable strategies or actions, even as against other state agencies.

**B. The Draft Plan fails to set firm guidelines for the implementation of flow criteria established by the State Water Resources Control Board.**

The Draft Plan fails to make the difficult choices relating to the core issue of flow criteria for the Delta. The Act provides that “[f]or the purpose of *informing planning decisions for the Delta Plan* and the Bay Delta Conservation Plan, the [State Water] board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources” based on “the best available scientific information.” (Water Code § 85086(c)(1)) The State Board did just that, publishing pursuant to § 85086(c)(1) a set of flow criteria on August 3, 2010. (SWRCB Resolution No. 2010-0039)

Despite the legislative mandate for the Council to use the best available science and for the State Board’s flow criteria to inform the Delta Plan, the Council merely uses the Draft Plan to state its resistance to applying the State Water Board’s flow criteria. The Draft Plan states:

In 2010, the SWRCB completed its report titled *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* (SWRCB 2010a). This report provides an assessment of the flows needed to protect the Delta and its ecological resources, but does not address other public trust considerations. While informing the broader flow-standard-setting process, the report also underscores the importance to California of resolving as soon as possible what those future flow regimes need to be. In addition, the SWRCB is coordinating with DWR in its preparation of environmental documentation for the Bay Delta Conservation Plan (BDCP) and may consider these environmental documents and other information developed for the BDCP in its proceedings to review flow requirements in the Delta.

(Draft Plan, p. 85) Furthermore, Policy ER P1 (p. 113 of the Draft Plan) calls for future “[d]evelopment, implementation and enforcement of new and updated flow requirements for the Delta” although the required flow criteria have already been developed and adopted.

Thus, the Draft Plan attempts to “kick the can down the road” despite the establishment of flow criteria by the State Water Board as mandated by the legislation. The draft Delta Plan is incorrect in asserting that the State Water Board’s flow criteria did not meet the Delta Reform Act’s requirement that the new flow criteria for the Delta ecosystem are those “necessary to protect public trust resources.” The flow criteria necessary to protect the public trust are

completed. As required by Section § 85086(c)(1), the Delta Plan must now be informed by those criteria. Section 85086 does not allow the Council to choose to ignore the flow criteria and treat them as some sort of interim decision simply because it requires the Delta Plan to tackle the difficult conflicts that arise from implementing the Act's co-equal goals.

The State Water Board's report is not merely a draft of flow criteria. It is the final criteria that must inform the Delta Plan. The Council cannot delay completing the Delta Plan further given its expanding violation of the deadline of January 1, 2012 for completing the Delta Plan. (Water Code § 85300(a)) The Draft Plan must be written to reflect the State Board's flow criteria that are based on protecting the public trust. The Draft Plan should strive to meet the co-equal goals while achieving all of those flow criteria wherever possible. To the extent the Council believes the flow criteria should not be followed, the Draft Plan should identify those conflict areas, make the tough decisions about where water exports and uses should be curtailed to protect the public trust, and analyze the resulting potential impacts in the accompanying EIR. However, by making believe some better flow criteria are coming in the future, the Council describes a course of inaction that violates the Delta Reform Act and leaves a gaping hole in the mandated plan.

**C. The PEIR for the Delta Plan falls short as a document to which future documents can be tiered under CEQA.**

Because the Delta Plan defers the analysis of the environmental effects of the various proposed covered actions, the EIR prepared for the Draft Plan fails to serve the purpose of a program EIR as contemplated by CEQA. CEQA Guidelines Section 15168(c)(5) clearly states, "[a] program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required."

There is no program in the Delta Plan. The "Plan" is a hodge-podge of lists of possible future activities by other agencies working on current and possible future projects purporting to advance one of the co-equal goals. Because the Council has failed to take the reins to coalesce the multitude of potential future actions into a comprehensive and enforceable plan, the accompanying DEIR attempts to review the impacts of no plan at all. By simply listing the entire universe of pending projects and emphasizing that the Draft Plan does not know what projects will occur, the Draft Plan and its accompanying EIR, although lengthy, breaks down into a pointless exercise that analyzes nothing. Rather than complying with the Delta Reform Act's call for a comprehensive and enforceable plan, the Council has created a document and process designed to divert attention from the substantive decisions being made elsewhere. And rather than taking the universe of projects and devising a true comprehensive plan that opts for some, perhaps rejects others and adds in components not yet embraced by any agency, the Council's plan is to simply say do all of the existing agency projects, not wishing to say "no" to any other agency, and keep all possible projects on the table. The result is a written version of



the status quo. The Council should not be allowed to hide behind the rules for PEIRs in an effort to evade the legislature's requirements that the Council develop a comprehensible and enforceable plan.

**D. The Draft Plan defers the analysis of impacts to the environment and mitigation thereof in violation of CEQA's mandate to inform the public.**

**1. Water Quality, Ecosystem Restoration and Biological Resources.**

The deferment of impacts analysis results in a failure to provide an adequate analysis of impacts on water quality, in turn infecting the analysis on ecosystem restoration and biological resources. Here, as in so many respects, the various subject fields intersect; water quality, ecosystem health, and biological resources are intimately interconnected. Because adequate flow criteria are not presented in the Delta Plan, water quality improvements are not assured. The result is a failure to provide an analysis of the impacts on water quality, ecosystem restoration and biological resources as required by CEQA.

At page 3-79, the DEIR presents a brief, general analysis of prospective adverse water quality impacts that might result from certain water conveyance and other supply reliability "operations." Here the DEIR mentions, in a general way, adverse impacts such as sedimentation, scour effects, accumulation of contaminants, and the like from activities including potential intakes, diversions, reservoir construction, transfers, and desalination plants. The relevant subsection (3.4.3.1.1) concludes by stating:

Project-level impacts would be addressed in future site-specific environmental analysis conducted at the time such projects are proposed by lead agencies. However, because named water supply reliability projects and projects encouraged by the Delta Plan could result in the potential violation of water quality standards due to construction activities and operation of facilities that would disturb the water chemistry and liberate certain pollutants in waterways, the potential impacts are considered **significant**.

(DEIR, p. 3-79, emphasis in original) This vague deferral ignores the biggest deficiency in the DEIR, which is its failure to discuss how the present water diversions or new ones contemplated will impact saltwater intrusion and polluted return flows that are degrading the estuary.

Despite the establishment by the State Water Board of flow criteria sufficient to restore the Delta ecosystem and protect water quality, the Delta Plan appears here to try to set the stage for a revival of water diversion levels that would violate those flow criteria. The way the DEIR does this is by identifying significant impacts to the environment from the project but explicitly declining to provide mitigation of these impacts to a level that is less than significant. The "mitigation measures" provided at pp. 3-93 to 3-93 for impacts to water resources are woefully inadequate. Only construction impacts are considered for mitigation, and so the DEIR simply omits the critical issue of how to mitigate the adverse impacts of additional diversions on the Delta ecosystem. Instead, the Draft Plan and its DEIR defer such mitigation to future actions and

leave to future lead agencies the responsibility of providing adequate mitigation. This deferment of mitigation is impermissible under CEQA because it renders this EIR incapable of serving its function of disclosing the relevant information about a project to the public. The deferment of specific impacts analysis and mitigation, moreover, effectively piecemeals the Delta Plan “project” into segmented actions in violation of CEQA, as explained more fully below.

The same problem with impacts on water quality occurs regarding impacts on fish and wildlife habitat at Section 4.1.3.1.3 and 4.1.3.1.4 of the DEIR:

Project-level impacts on fish and wildlife habitat would be addressed in future site-specific environmental analysis conducted at the time such projects are proposed by lead agencies. However, because named projects and projects encouraged by the Delta Plan could result in substantial adverse effects on habitats for fish and wildlife species, this potential impact is considered **significant**. ... Facilities constructed to improve water supply reliability could temporarily interfere with the movement of fish and wildlife during construction. These projects could continue to interfere with the movement of fish and wildlife during operations, particularly those that could influence large areas or alter flows such as new surface water storage projects. ... for the purposes of this program-level analysis, this potential impact is considered **significant**.

(DEIR, p. 4-65 to 4-66, emphasis in original) At p. 4-82, the DEIR purports to provide mitigation measures for the impacts on biological resources. However, the measures provided are general in nature and there is no evidence provided as to the feasibility of these measures. They all sound fine, but there is simply no possibility that the reader or the general public can gauge what chance there is, if any, that the mitigation measures provided can be accomplished. For example, the DEIR’s mitigation for impacts on “Sensitive Natural Communities, Including Wetlands and Riparian Habitat” includes this measure: “[a]void, minimize, and compensate for reduction in area and/or habitat quality of sensitive natural communities, including wetlands, by doing the following: ...Selecting project site(s) that would avoid sensitive natural communities, including jurisdictional wetlands and other waters, vernal pools, alkali seasonal wetlands, riparian habitats, and inland dune scrub.” (DEIR, p. 4-83.) This sounds good, but do any such sites exist? No answer is given. Feasibility is required of all mitigation measures under CEQA. The same problem infects the subsections concerned with adverse effects on Fish or Wildlife Species Habitat (Section 4.4.3.6.3 at p. 4-85) and Migratory Fish or Wildlife Species (Section 4.4.3.6.4 at pp. 4-85 to 4-86).

## **2. The deferment of impacts analysis violates CEQA because it precludes meaningful analysis of the environmental effects of the project.**

The DEIR precludes meaningful CEQA review by its omission of foreseeable environmental impacts of the project. Since the impacts analysis is general in nature and lacks specificity, it cannot be evaluated as to how those effects can be mitigated. This problem is particularly applicable to the DEIR’s failure to evaluate the impacts of the flow criteria developed by the State Water Board. (*See supra*, pp. 7-8) The State Water board has provided

flow criteria designed to recover the Delta and protect the public trust. The Board provided these flow criteria “for the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan.” But the Draft Plan and its DEIR evade this mandate. The DEIR should have evaluated the foreseeable impacts of implementing these concrete, non-speculative flow criteria. Such an analysis is required where a Plan makes a “commitment to future facilities other than furnishing siting criteria and designating generally acceptable locations.” (*Rio Vista Farm Bureau Center v. County of Solano* (1992), 5 Cal.App.4th 351, 371.) By avoiding making a commitment to implement specific flow criteria, the Council has evaded the rule as set out by the Court in *Rio Vista*: the Council has a responsibility to evaluate impacts of a project where such impacts are reasonably foreseeable results of specific actions. The Council should not be allowed to misuse the rules governing PEIR’s in order to evade its statutory mandate to incorporate the State Water Board’s flow criteria into the Draft Plan and evaluate the impacts thereof.

Moreover, as we argue below, the Council is required to evaluate the impacts of different flow regimes on the public trust. But the Council has deferred this balancing of flow regimes against impacts on the public trust. Besides violating the public trust doctrine, as we argue *infra*, this deferment violates CEQA.

The DEIR as written is similar to a general plan, which would serve as a guide for the approval of future specific plan approvals. In such cases, courts have rejected the notion that later project-level review excuses adequate environmental review at the general plan amendment stage. (*See, e.g., City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 251-252; *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1026-1027; *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 184, 193-196)

Moreover, as the California Supreme Court has pointed out:

We recently articulated the appropriate role of tiering: “While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA’s demand for meaningful information ‘is not satisfied by simply stating information will be provided in the future.’ [citation] As the CEQA Guidelines explain: ‘Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.’ (Cal. Code Regs., tit. 14, § 15142, subd. (b))

... Stated another way, CEQA contemplates consideration of environmental consequences at the “earliest possible stage, even though more detailed environmental review may be necessary later.” The requirements of CEQA cannot be avoided by piecemeal review which results from ‘chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.’ (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370.)

*(Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection, 44 Cal. 4th 459, 502-503)*

As the repeated exercise of describing in general terms the environmental effects of the various contemplated covered projects demonstrates, those effects are reasonably foreseeable. Thus, those effects and the mitigation thereof must be analyzed rather than deferred. This was not done. As a consequence, the public cannot ascertain what the ultimate specific effects of the “project” will be, much less how they will be mitigated.

**E. The Draft Plan fails to provide a proper analysis of Alternatives, in violation of CEQA.**

The DEIR contains an incomplete analytical approach to evaluate and compare Alternatives. This deficiency requires that the Alternatives Section for the DEIR be rewritten. The DEIR states, “[t]he degree to which the alternatives might or might not satisfy the project objectives and be feasible is something the Delta Stewardship Council will consider at some point after the release of this Draft program-level EIR but prior to consideration of final adoption of a Delta Plan.” (DEIR, p. 25-1) The DEIR should present its full Alternatives analysis, detailing which Alternatives are feasible and which satisfy the project objectives. Postponing this consideration to a time after public review thwarts CEQA’s goal of informed public participation.

The PCFFA maintains that the original EWC-proposed “Alternative 2”, as described more fully in the report *California Water Solutions Now*, should be selected as the Proposed Project (Preferred Alternative) for this EIR. The EWC proposed as much in its comment on the Fifth Draft of the Delta Plan, but the Council has since altered Alternative 2, so that what the DEIR now calls “Alternative 2” is something different from what the EWC originally proposed. But EWC’s *original* proposal is superior in all areas, including but not limited to Delta restoration, water supply reliability, flood risks, water quality, greenhouse gas emissions, and climate change impacts. Additionally, when economics are considered, PCFFA maintains that an analysis balancing the various public trust considerations implicated by the Delta Plan favors Alternative 2 as the environmentally superior Alternative.

**1. The DEIR should remove various poison pills inserted into the alternative proposed by the EWC.**

The DEIR’s should eliminate various poison pills included in the DEIR’s version of Alternative 2, which differ from the alternative proposed by the Environmental Water Caucus. The DEIR incorrectly characterizes Alternative 2 as advocating more ocean desalination. The EWC Alternative 2 did not recommend expansion of Friant/Millerton reservoir. (Table 2-4, Page 2A-71) The reference to the EWC agreement with the recommendation to complete the BDCP (Table 2-4, Page 2A-72) is taken out of context. The EWC also stated that the Proposed Project will not likely enable the BDCP to meet either the flow requirements or the water quality

objectives envisioned in the Delta Plan. Thus, it is doubtful whether the BDCP as currently proposed can advance the co-equal goals of water supply reliability and ecosystem restoration under the DEIR's Proposed Project. EWC believes the BDCP should be evaluating options to not include a new peripheral canal.

Furthermore, Alternative 2 relies mainly on maximizing the use and improvement of existing facilities south of the Delta. Thus, Alternative 2 has a far less significant impact on the Delta environment than any of the conveyance-oriented construction alternatives described or anticipated in the DEIR. Moreover, since there will be little or no financing available for significant conveyance construction and little or no further water available from the Sacramento River as a result of climate change, Alternative 2 stands as a superior alternative to the Proposed Project.

The EWC Alternative 2 made no recommendation regarding abandonment of South Delta intakes. (Table 2-4, Page 2A-72)

The EWC Alternative 2 is incorrectly characterized as "Less emphasis than Proposed Project on ecosystem restoration throughout the Delta..." (Table 2-4, Page 2A-74) This is in error. The EWC (and PCFFA) agrees with the Council's reliance on the *Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions* (DFG 2011). PCFFA also supports most of the Ecosystem Restoration Program features of the CALFED program. PCFFA recommends that the Council require DFG to fully integrate restoration with inputs from the NMFS and FWS, for both aquatic and terrestrial habitats. (ER P2) The finding in the Table that Alternative 2 places less emphasis than the Proposed Project on ecosystem restoration throughout the Delta is in error. The DEIR should reflect that the emphasis in Alternative 2 on Ecosystem Restoration is the same as or similar to the Proposed Project.

The characterization of Alternative 2 as having "...[l]ess emphasis than Proposed Project on reducing flood risk for all lands in the Delta areas..." (Table 2-4, Pages 2A-79 & 80) does not consider the EWC recommendation to immediately initiate planning to upgrade core levees above the PL88-9 standard, in accordance with the recommendations of the Delta Protection Commission.

PCFFA supports dealing with drainage problems in the least environmentally harmful manner by eliminating irrigation practices that cause pollution to surface- and groundwaters or that impact the survival of salmon and other aquatic species. This includes retiring the drainage-impaired farmland and converting to less environmentally damaging uses. Those uses would include, but not be limited to, dry farming or energy production which would also be more cost-effective through the elimination of plants and infrastructure to recycle the drainage water. The U.S. Geological Survey (USGS), in Open File Report No. 2008-1210 states that "*Land retirement is a key strategy to reduce drainage because it can effectively reduce drainage to zero if all drainage-impaired lands are retired.*" (CEQA Guideline 15126.5, Discussion of Alternatives)

**2. The Council must select a revised Alternative 2 as the environmentally-superior alternative that best achieves the Reform Act's objectives and co-equal goals.**

More generally, the document *California Water Solutions Now* serves as a basis for the designation of Alternative 2 as the Proposed Project. This document demonstrates why Alternative 2 best advances the co-equal goals, whereas the DEIR's Proposed Project favors water supply over ecosystem restoration.

With the above corrections or modifications applied to Alternative 2 in Section 2A, there would be no basis for selecting the Proposed Project as superior to Alternative 2, especially in view of the fact that even without the modifications, Section 25 – Comparison of Alternatives – indicates that “Alternative 2 is *slightly* (emphasis added) environmentally inferior to the Proposed Project” (Page 25-11, Line 16). With the cumulative impact of the corrections noted above, PCFFA recommends that Alternative 2 be designated as the Proposed Project.

**3. Loss of farmland in specific areas of selenium- and salt-laden soils would be beneficial to public health, water quality and the public trust.**

The EIR at p. 25-11 states that Alternative 2 is environmentally inferior, in part, because it would result in the loss of substantial amounts of farmland. However, that analysis fails to take into account the benefits to water quality in the Delta of removing that farmland under Alternative 2. Removal of farmland would result in less water pollution in the Delta and the Delta's tributaries from farm runoff. Less toxic runoff is an environmental benefit. The EIR should be re-written to reflect this consideration in detail.

**F. The Delta Plan fails to properly evaluate impacts on recreation.**

Recreational activities stand to be severely impacted by various components of the Delta Plan. One area is sportfishing. As the DEIR indicates at pp. 18-10 to 18-11, sportfishing has declined significantly over the last 14 years, correlating with a general decline in the health of the Delta ecosystem. Boating enthusiasts have reported concerns with water quality; such concerns relate particularly to swimmers and any persons who might come into contact with the water. (See DEIR at p. 18-13.)

The DEIR describes in general terms various adverse impacts on recreation (from water supply reliability activities, Sections 18.4.3.1.1, 18.4.3.1.2, 18.4.3.1.3; from ecosystem restoration activities, Sections 18.4.3.2.1, 18.4.3.2.2, 18.4.3.2.3; from water quality protection activities, Sections 18.4.3.3.1, 18.4.3.3.2, 18.4.3.3.3; and from flood risk reduction activities, Sections 18.4.3.4.1, 18.4.3.4.2, and 18.4.3.4.3). Each of these sections concludes that the impacts are expected to be significant, yet each of these sections – as with many of the impacts sections in this DEIR – defers the analysis of precisely how these impacts will be mitigated to future studies. The section on mitigation of impacts on recreation suffers from the same

infirmities as the mitigation sections on biological and water resources mentioned above: they are general in nature, are contingent on future decisions, and are backed by absolutely no evidence of feasibility.

**G. The DEIR fails to analyze the Project's greenhouse gas and global warming impacts.**

PCFFA agrees with the Environmental Water Caucus that the Delta Plan needs to be integrated with the California Climate Adaptation Strategy and the efforts of the Water Energy Task Force of the California Climate Action Team. The Council should include within the Delta Plan specific guidelines for addressing greenhouse gas emissions for any covered activity.

PCFFA also agrees with the EWC that the Delta Plan DEIR assumes without foundation that GHG impacts can be evaluated piecemeal for individual projects. Once again, the specter of segmentation raises its head. The cumulative impacts of GHG emissions from all the potential construction activities contemplated need to be quantified and analyzed.

It is worth noting that Section 15064.4 was recently added to the CEQA Guidelines. Under this section, lead agencies are required to conduct specific GHG analyses. For example, a lead agency must now "make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project." (CEQA Guidelines § 15064.4(a)) The DEIR fails to make such a good faith effort because it opens up a process of segmenting the Delta Plan into many separate actions in which the assessment of GHG impacts is left to each individual lead agency. This procedure all but ensures that the cumulative impacts of GHG emissions across the various covered activities will not be evaluated. This violates CEQA.

The DEIR should be amended to include an analysis of the GHG impacts of the various covered activities, including the cumulative impacts of the covered activities taken together. Such an analysis will have to include the impacts on GHG emissions from conveyance projects that provide water to parts of the state outside the Delta region.

**H. Cumulative impacts and piecemealing.**

Because this DEIR contemplates so many future projects, it must analyze the cumulative impacts of all foreseeable future projects both for which consistency determinations might be required and that are referenced within the DEIR. This has not been done.

CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment -- which cumulatively may have disastrous consequences." *Bozung v. LAFCO*, 13 Cal.3d 263, 283-84 (1975); *City of Santee v. County of San Diego*, 214 Cal.App.3d 1438, 1452 (1989).

While Section 22 of the DEIR, “Cumulative Impacts Assessment,” contains a list of potential future projects that could create cumulative impacts, there is no indication that this list is exhaustive or contains all reasonably foreseeable future projects. Furthermore, the mitigation measures provided for these impacts fall short of legal requirements. As above, the mitigation measures are general in nature and there is no indication that any of the measures are feasible.

**I. Consideration of adequate water to meet public trust obligations must be included in order to comply with CEQA.**

To ensure the Delta estuary ecosystem is restored, flows are needed to protect habitat and provide stream passage for migrating and/or spawning fish species. By legislative mandate the Council needs to enact a Plan that, at its heart, addresses the excessive diversions of water from the Delta. Federal and state agencies must curtail diversions to ensure the water quality and constitutional requirements of beneficial use and protection of public trust values are enforced. Excessive diversions and promises of unsustainable water supplies perpetuate paper water promises and endless litigation. Such enforcement and adoption of enforceable implementation policies would balance water exports with real water available and be consistent with the seniority-based water right system in California and area of origin requirements. (See Water Code §§ 85031(d), 85032) The Reform Act expressly requires the Council to include in the Plan subgoals and strategies to “[r]estore Delta flows and channels to support a healthy estuary and other ecosystems.” (Water Code § 85302(e)(4)) To omit from the Plan how these water diversions need to be adjusted to reflect existing conditions and meet the law is not comprehensive and fails to meet the mandate of the co-equal goals. The Plan could discuss how such considerations could be addressed so that sufficient water is available to restore the Delta in light of the co-equal goals. The Council was directed by the Act to address such considerations and develop a plan in a way that “does not diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914.” (Water Code § 85031(a)) This would benefit the Delta ecosystem, for example, as reflected in Alternative 2’s proposed retiring of certain highly irrigated agricultural land in favor of dry farming. The bottom line is that water necessary to meet the co-equal goal of ecosystem restoration has been misappropriated, and that misappropriation needs to be addressed by the Council in this Plan.

However, the Plan at the outset avoids the issue of addressing these excessive diversions altogether. Nothing in the Act prevents the Council from recommending that the State Board enforce the existing seniority-based water rights system and protect area of origin beneficial uses. However, the Plan declines to address the issue of sustainable water diversions in any way, shape or form. Thus, the Council declines in the Plan to provide any advice whatsoever on how water rights will interact with any covered actions to impact the environment. This arbitrary limitation, among other things, forecloses considerable areas of impact analysis in violation of CEQA. The Delta Plan will interact with water rights with a resulting impact on the environment, but the Plan refuses to identify or analyze those impacts. This is true despite the fact that the Plan admits that such impacts will occur. (Delta Plan at pp. 6-7)



Demanding water diversions from the Delta be revised to reflect the reality of water available is of course a controversial issue. The Plan admits this when it states, “this highly polarizing issue would likely yield little near-term progress toward reaching California’s water management goals.” (Delta Plan at p. 6) However, just because an issue requires a long-term timeframe for resolution does not mean it is beyond the scope of the Delta Plan. After all, the Act sets forth as policy the goal to “[m]anage the Delta’s water and environmental resources and the water resources of the *state over the long term*. (Emphasis added) If enforcing California’s seniority-based water rights system and respecting area of origin priorities would help to promote the co-equal goals, then treatment of how such enforcement should proceed is clearly within the scope of the Council’s responsibility in developing a Delta Plan that “moves the ball forward.”

A related problem is that the DEIR fails to address the environmental setting from the point of view of water resources and these unsustainable water diversions. The Plan and its DEIR omit a fundamental aspect of the environmental setting for water resources. That aspect is the current and historical over-allocation of water rights. Put simply, more water has been committed for export than is available in the Delta. Any plan to restore the Delta ecosystem while ensuring a reliable water supply must address the problem of over-allocation. Unbelievably, the DEIR ignores this problem altogether and fails to address this aspect of the environmental setting, despite the fact that the Plan admits that State Water Project and Central Valley Project “deliveries have averaged about 60 percent of the total original contracted amounts. (Delta Plan, p. 77) Moreover, no plan that fails to evaluate how to overcome the problems stemming from the historical over-allocation of water out of the Delta can be considered “comprehensive.”

#### **J. The Draft Plan Violates the Public Trust Doctrine.**

The California Supreme Court has long held that state agencies must conduct a balancing of public trust resources when considering diversions of water from navigable state waters. The case of *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419 (1983) (“Mono Lake”) illustrates the requirements which the Public Trust imposes on state agencies:

In our opinion, the core of the public trust doctrine is the state’s authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. ... [W]e believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.

(*Mono Lake*, 33 Cal. 3d at 435-436) The *Mono Lake* case is analogous to the situation here because that matter also involved a significant diversion of water from a sensitive ecosystem and navigable waterway for the purpose of providing water supplies outside of that ecosystem for water-deficient areas of Southern California. In that case, the court held that a balancing of public trust values was required. That is to say, it would be inappropriate for the state to approve

of a water diversion without considering the effects of such a diversion on public trust resources. This principle would appear to underlie the legislature's intent that the Act pursue the "co-equal" goals of *both* ensuring a reliable water supply *and* restoring the Delta ecosystem.

The Act provides in pertinent part: "The Delta Stewardship Council is hereby established as an independent agency of the state." (Water Code § 85200(a)) The Act also provides that the Council in its appellate role will have the power to approve (or disapprove) water diversions in the Delta when it hears a challenge to the approval of a conveyance facility that diverts water from the Delta. (*See* Water Code §§ 85225.10, 85225.15, and 85225.25) Moreover, the Council will have the authority to find a covered action inconsistent with the BDCP if the BDCP is incorporated into the Delta Plan. (*see* the Draft Plan at p. 62) Therefore, the Council has a responsibility under the Act and the public trust doctrine to "consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests." (*Mono Lake*)

The Delta Plan and its DEIR fail to ensure that the Council will conduct this required balancing. Rather, the DEIR defers to the future such considerations. The Draft Plan at p. 85 characterizes the State Water Board's recent flow criteria report as follows: "This report provides an assessment of the flows needed to protect the Delta and its ecological resources, but does not address other public trust considerations." This frank admission of fact is all the Council needs to plug those criteria into its plan for restoration of the Delta ecosystem. Instead, the Council abdicates the consideration of those "other public trust considerations" to future studies by the State Water Board. (*See supra*, pp. 7-8.) It is impossible to square this failure to address the public trust in light of the Act's mandate contained in Section 85023: "The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." The Council has all it needs from the legislature to conduct precisely the needed analysis of what effect those flow criteria will have on public trust resources.

Restoring flows to the Delta is the most important issue the delta Plan must address. Indeed, the Act recognizes the crisis in the Delta stems overwhelmingly from the excessive exportation of water from the Delta. (*See*, e.g., Water Code §§ 85001(a) and 85003) As the California Sportfishing Protection Alliance (CSPA) has stated, "The bottom line is that the Central Valley hydrograph has been turned on its head and far too much water had been diverted to other purposes. The result is an astonishing collapse of one of the great natural estuaries in the world." (CSPA, Closing Statement before the State Water Board, April 13, 2010)

The required balancing of water diversions against the impacts on public trust resources will obviously not necessarily result in complete protection of the public trust against the demands of water users. The Delta cannot be fully restored to pre-civilization conditions. That is the point – a balancing must occur, and the Draft Plan must begin to quantify all the variables in such a balancing if it is to comply with the public trust doctrine. Therefore, the Draft Plan and its DEIR will have to take economic effects into consideration, given the many interests which

rely on water diversions from the Delta. This has not been done. Instead, the Draft Plan and its DEIR appear to place that burden on the State Water Board:

In addition to the encouragement of habitat restoration actions, the Proposed Project encourages the SWRCB to update the Water Quality Control Plan, including development of flow criteria for priority tributaries and new flow objectives for the Delta. The updated flow objectives would result in less-than-significant or beneficial effects on riparian and wetland communities along priority tributaries and in the Delta, if the new flow requirements reflect a more natural flow regime. The implementation of these flows, however, could result in a reduction in the availability of water for export from the Delta. This could lead to a significant impact on sensitive communities if this reduction were to lead to dewatering of agricultural conveyance channels that support riparian vegetation.

(DEIR, p. 4-69) Having identified this potential impact on “sensitive communities,” however, the DEIR provides no indication of how such impacts should be balanced against the public trust values of the Delta ecosystem. This presumably leaves to the State Water Board and other agencies the responsibility to conduct such balancing. But the State Water Board has already provided the flow criteria necessary to begin the long overdue restoration of the Delta ecosystem. Rather than plugging in those criteria into the Delta Plan itself and balancing the impacts to water supply against the benefits to the ecosystem, the DEIR “punts” this required analysis to a later time when the State Water Board might adopt other so-called “updated flow objectives” more to the liking of the interests of water users served by those other “updated flow objectives.”

The critical point here is that the deferment of impacts and mitigation with respect to anticipated water diversions causes this DEIR to fail to balance the public trust values as between ensuring water supply reliability and restoring the Delta ecosystem, in violation of the public trust doctrine.

## Conclusion

The state legislature, in the Act, has provided guidance for the development and implementation of the Delta Plan. That guidance fundamentally requires a reversal of the historical trend of removing water from the Delta ecosystem for the state’s water supply needs at the expense of the health of the Delta ecosystem. The establishment of the co-equal goals elevates the status of the Delta ecosystem to equal in priority to the state’s water supply needs. And the creation of the Council and development of the Delta Plan is intended to work a fundamental change in governance over decisions affecting the Delta. The Council thus far has drafted a plan to protect the status quo rather than the Delta. And in its strive to defer to the agencies that thus far have failed to identify the balance necessary to restore the Delta and assuring a sustainable water supply for California, the Council has proposed an EIR that fails to inform the public of any coherent, comprehensible plan or its impacts. The goal of an “enforceable” plan, like CALFED, has been lost in the dense thicket of agency and water contractor agendas from which few travelers emerge. Only if the Council takes seriously its charge “to establish a governance structure that will *direct efforts across state agencies* to

develop a legally enforceable Delta Plan” will it emerge from the woods with the co-equal goals in sight. The Council should amend the draft Plan consistent with the considerations raised by PCFFA, IFR and CSPA.

Thank you for considering these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael R. Lozeau".

Michael R. Lozeau

Samuel B. Johnston

Lozeau Drury LLP

On behalf of Pacific Coast Federation of Fishermen's  
Associations and California Sportfishing Protection  
Alliance